

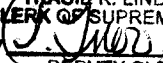
IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD E. MITCHELL, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 56891

**FILED**

**MAR 17 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant filed his petition on May 28, 2010, more than one year after issuance of the remittitur on direct appeal on December 12, 2008. Mitchell v. State, 124 Nev. 807, 192 P.3d 721 (2008). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>Mitchell v. State, Docket No. 53345 (Order of Affirmance and Directions for Correction of Judgment of Conviction, November 5, 2009).

petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).


In an attempt to overcome the procedural bars, appellant raised three good cause claims. First, appellant claimed that he had good cause because trial counsel was ineffective for failing to object when the State presented an expert witness at trial without following the disclosure requirements of NRS 174.234(2). Appellant failed to demonstrate that this claim provided good cause because it could have been raised in his previous petition. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Further, the underlying claim was raised on direct appeal and was rejected. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Because this court already concluded that appellant's underlying claim did not demonstrate prejudice sufficient to warrant reversal, appellant necessarily failed to demonstrate prejudice to overcome the procedural bars. Therefore, the district court did not err in denying this claim.

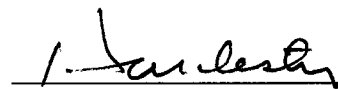
Second, appellant claimed that he had good cause because the district court failed to appoint counsel to represent appellant during the proceedings on his previous petition. Appellant failed to demonstrate that he was entitled to the appointment of counsel. NRS 34.750(1) (the appointment of counsel in post-conviction petitions for writs of habeas corpus is discretionary). Therefore, this claim does not provide a legal excuse sufficient to overcome the procedural bars, see Hathaway, 119 Nev. at 252, 71 P.3d at 506, and the district court did not err in denying this claim.


Third, appellant claimed that he had good cause because it would be a fundamental miscarriage of justice if his substantive claims

were not considered. Appellant failed to demonstrate any fundamental miscarriage of justice to overcome the procedural bars. See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We therefore conclude that the district court did not err in denying appellant's petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, J.  
Saitta

 \_\_\_\_\_, J.  
Hardesty

 \_\_\_\_\_, J.  
Parraguirre

cc: Hon. Jackie Glass, District Judge  
Donald E. Mitchell, Jr.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk